

ENTERED

February 18, 2020

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

DONALD WAYNE HEROD,

Plaintiff,

VS.

D. POWELL, *et al.*,

Defendants.

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CIVIL ACTION NO. 2:19-CV-271

**ORDER ADOPTING MEMORANDUM AND RECOMMENDATION AND
AMENDED MEMORANDUM AND RECOMMENDATION**

I. The Court Adopts the M&R (D.E. 10)

Before the Court is Magistrate Judge Jason B. Libby's Memorandum and Recommendation (M&R), entered on September 24, 2019. (D.E. 10). The M&R recommends that Plaintiff's § 1983 claims against Defendants be dismissed with prejudice as frivolous until such time as Plaintiff satisfies the conditions set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994). The M&R further recommends that this dismissal count as a "strike" for purposes of 28 U.S.C. § 1915(g). Plaintiff timely filed objections to the M&R on October 3, 2019. (D.E. 13).

First, Plaintiff objects to the factual finding that he has had two prior § 1983 suits dismissed on *Heck* grounds. Specifically, he states that civil action number 4:16-cv-0808 was not filed by him. After reviewing the docket in that case and finding that it was brought by Defendant, this objection is **OVERRULED**.

Second, Plaintiff seemingly objects to the M&R's conclusion that his claim is frivolous by re-arguing the merits of his § 1983 claim. For the same reasons laid out in the

M&R and because Plaintiff has not met the *Heck* conditions, this objection is **OVERRULED**.

II. The Court Adopts the Amended M&R (D.E. 24)

Also before the Court is Magistrate Judge Libby's Amended M&R entered on December 2, 2019. (D.E. 24). The Amended M&R recommends that Plaintiff's motion seeking preliminary injunctive relief (D.E. 16) be denied. Plaintiff filed objections to the Amended M&R on December 30, 2019 and January 6, 2020. (D.E. 33; D.E. 34).

Plaintiff does not object to the substance of the Amended M&R but again challenges his underlying conviction by way of arguing his § 1983 claim. As discussed above, Plaintiff's claims are *Heck*-barred and he has not satisfied any of the four elements of the test to establish preliminary injunctive relief. Accordingly, his objections to the Amended M&R are **OVERRULED**.

The Court will also address Plaintiff's objections to the Magistrate Judge's handling of aspects of this case, (D.E. 39; D.E. 41), by explaining that the Magistrate Judge is permitted to resolve all pre-trial, non-dispositive matters without the parties' consent under 28 U.S.C. §636.

III. Conclusion

Thus, after reviewing the facts, conclusions of law, and recommendations set forth in the M&R and the Amended M&R, as well as Plaintiff's objections and all other relevant documents in the record, and having made a de novo disposition of the portions of the M&R and Amended M&R to which the objections were directed, the Court **OVERRULES** Plaintiff's objections. The Court **ADOPTS** the findings and conclusions of the Magistrate

Judge. (D.E. 10; D.E. 24). Accordingly, Plaintiff's motion seeking preliminary injunctive relief (D.E. 16) is **DENIED**. Further, this action is **DISMISSED with prejudice** as frivolous until such time Plaintiff satisfies the conditions set forth in *Heck*. This dismissal is counted as a strike for purposes of 28 U.S.C. § 1915(g), and the Clerk of Court is **INSTRUCTED** to send notice of this dismissal to the Manager of the Three Strikes List for the Southern District of Texas at Three_Strikes@txs.uscourts.gov.

SIGNED and ORDERED this 18th day of February 2020.



DAVID S. MORALES
UNITED STATES DISTRICT JUDGE